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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1161

PARIS ADULT THEATRE, I,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE, II,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

APPENDIX – VOLUME II

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APPENDIX – VOLUME II

IN SUPREME COURT OF WISCONSIN

State No. 179
August Term, 1973

State of Wisconsin ex rel. JOSEPH CHOBOT,
Petitioner,
v.
CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE HERBERT J. STEFFES,
CIRCUIT JUDGE, Presiding,
Respondent.

(Filed December 10, 1973)

ORIGINAL ACTION for a writ of prohibition to restrain the Honorable Herbert J. Steffes, Circuit Judge of the 2nd Judicial Circuit, Branch No. 11, for Milwaukee County. *Writ denied.*

This is an original action for a writ of prohibition to restrain the respondent Herbert J. Steffes, Circuit Judge, from proceeding with the trial of the petitioner Joseph Chobot on a charge of selling obscene pictures. On May 26, 1972, Chobot, the operator of Century Book Store in Milwaukee, sold a magazine entitled "Response" for $5 to a police officer, for which he was charged with a violation of sec. 944.21 (1) (a), Stats. A motion was filed to dismiss the case on the ground the section was unconstitutionally vague. This motion and a similar renewal motion were denied by the respondent and the case was set for trial on August 6, 1973. A petition for a writ of prohibition was then filed with this court on August 2, 1973. In view of *Miller v. California* (1973), 000 U.S. 000, 93 Sup. Ct. 2607, 37 L. Ed. 2d 419, decided June 21, 1973, this court, after hearing oral arguments, elected to treat the petition as one for leave to commence an original action and ordered the proceedings in the trial court stayed.

HALLOWS, C. J. Chobot contends: (1) That sec. 944.21 (1) (a), Stats., is unconstitutionally vague under *Miller v. California* and companion cases[1] as written and as heretofore construed by this court; (2) that to meet the standards of definiteness, this court may not reconstrue the section so that it contains the test of obscenity formulated in *Miller*; and (3) even if this court reconstrues the section, such construction cannot be retroactively applied to his prior acts.

There is no definition of "obscenity" in sec. 944.21 (1) (a), Stats., which provides:

> "Lewd, obscene or indecent matter, pictures and performances.
>
> (1) Whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:
>
> (a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film;"

As written, this section on its face is vague under the test laid down by *Miller*, which requires a definition of obscenity either expressly written in the statute or furnished by interpretation. In a homogenized society, it might be assumed

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[1] See *Paris Adult Theater I v. Slaton* (1973), 000 U. S. 000, 93 Sup. Ct. 2628, 37 L. Ed. 2d 446; *Kaplan v. California* (1973), 000 U. S. 000, 93 Sup. Ct. 2680, 37 L. Ed. 2d 492; *Alexander v. Virginia* (1973), 000 U. S. 000, 93 Sup. Ct. 2803, 37 L. Ed. 2d 993; *Heller v. New York* (1973), 000 U. S. 000, 93 Sup. Ct. 2789, 37 L. Ed. 2d 745; *Roaden v. Kentucky* (1973), 000 U. S. 000, 93 Sup. Ct. 2796, 37 L. Ed. 2d 757; *United States v. Orito* (1973), 000 U. S. 000, 93 Sup. Ct. 2674, 37 L. Ed. 2d 513; *United States v. Twelve 200-Foot Reels of Super 8MM Film* (1973), 000 U. S. 000, 93 Sup. Ct. 2665, 37 L. Ed. 2d 500.

everyone understands what obscenity means, at least for a reasonable period of time; but in our pluralistic society with varying, changing standards of conduct, the word "obscenity" has come to mean many different things to different people. Being a criminal statute, sec. 944.21 (1) (a) must give fair notice of what is prohibited and so, the latest pronouncement in the fluctuating definition of obscenity by the United States Supreme Court now requires the term "obscenity" to be defined and limited in its terms to sexual conduct.

Textual or pictorial obscenity is related to the freedom of speech guaranteed by the First Amendment to the United States Constitution; and while it has been said the obscenity is not protected by the First Amendment to the constitution, this statement must be understood to include only obscenity defined in constitutional terms. Obscenity in a layman's sense may not be obscenity in a constitutional sense; and even what might be considered as flagrant obscenity in a layman's sense may be given constitutional protection.

Miller, in modifying previous rules to determine obscenity, recognizes the permissible extent to which a state may regulate expression of obscenity in a constitutional sense. The court states at p. 2614:

> "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

The guidelines to the definition of "obscenity" are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . ., (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic ,political or scientific value." *Miller v. California, supra,* 2615.

Thus the states are restricted to regulating works which depict or describe sexual conduct, which must be defined either in the statute or in its authoritative judicial construction; and the sexual conduct so defined must be portrayed in a patently offensive manner; and the work, so portraying sexual conduct, taken as a whole, must appeal to the prurient interest in sex of the average person judged by contemporary community standards and have no serious literary, artistic, political or scientific value. All other expression or portrayal of undefined sexual conduct apparently is protected by the First Amendment to the constitution.

What appeals to "prurient interest in sex" must be judged by community standards. What amounts to "patently offensive" in the manner of description is not expressly defined in *Miller,* but it is reasonable to read this term, too, as being determined by contemporary community standards (*see* our comment, p. 149, in *McCauley v. Tropic of Cancer* (1963), 20 Wis. 2d 134, 121 N.W. 2d 545). There is no vagueness in the commonly-accepted meaning of the terms "literary, artistic, political or scientific value" and these are qualified by the adjective "serious" which means important and not trifling.

Miller has not made as many modifications of the *Roth-Memoirs* test, at least in the Wisconsin construction of

its statute, as one at first blush might think. Prior to the decision in *Miller*, the prevailing test of obscenity was that articulated in *Memoirs v. Massachusetts* (1966), 383 U.S. 413, 86 Sup. Ct. 975, 16 L.Ed.2d 1, which itself merely refined the test of *Roth v. United States* (1967), 354 U.S. 476, 77 Sup. Ct. 1304, 1 L.Ed.2d 1498. In *Memoirs*, the court stated at p. 418 that under the *Roth* test:

> "... as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Chobot argues that at least three major changes were made by *Miller* in the *Roth-Memoirs* test: (1) That the statute as written or construed must specifically define sexual conduct; (2) community standards means state as opposed to national standards; and (3) the requirement that the material be "utterly without redeeming social value" has been replaced by the more definite concept that the material have "serious literary, artistic, political or scientific value."

This court in its prior construction sec. 944.21 (1) (a), Stats., has adopted the *Roth-Memoirs* formulation of constitutional obscenity with some modifications. In *State v. Chobot* (1960), 12 Wis. 2d 110, 106 N.W. 2d 430, this court adopted the *Roth* test of obscenity and sustained the trial court's finding that certain magazines were, in fact, obscene. In so construing sec. 944.21 (1) (a), the court held the words "lewd, obscene or indecent" were not constitutionally vague and indefinite. In *Tropic of Cancer* (1963), 20 Wis. 2d 134, 121 N.W. 2d 545, the court again applied the *Roth* test of obscenity although this time in a civil action for a declaratory judgment involving sec. 269.565, Stats. The trial court had

declared *Tropic of Cancer* to be obscene; after an independent review of the book, this court reversed but upheld sec. 269.565 against the challenge that it was unconstitutional for vagueness. In reversing, this court concluded the trial court had given insufficient consideration to the fact that the book had "commanded serious attention as a literary work of some importance" and stated, p. 143: "Where a work of apparent serious purpose is involved, the scales will not readily be tipped toward the determination of obscenity."

In 1966 the United States Supreme Court decided *Memoirs v. Massachusetts, supra,* and in a plurality opinion the *Roth* test was redefined and elaborated upon. This court thereafter modified its construction of sec. 944.21 (1) (a), Stats., to reflect the *Memoirs* formulation. In *State v. Veshart* (1968), 39 Wis. 2d 419, 159 N.W. 2d 1, the question of obscenity arose in the context of a challenge to the contraband statute, sec. 963.04(5), and this court held the words "lewd, obscene or indecent" in that section "must be interpreted in the constitutional sense, as including only printed or filmed material that are not protected by the First Amendment to the United States Constitution as interpreted by the United States Supreme Court." The *Roth-Memoirs* test and the hard-core pornography test were both discussed and the material found obscene under both of them.

In *State v. Amato* (1971), 49 Wis. 2d 638, 183 N.W. 2d 29, the court sustained a conviction under sec. 944.21 (1) (a), Stats., for the sale of obscene material, relying on an independent review of the magazines involved and upon the *Roth-Memoirs* test. The court also considered whether the *Roth-Memoirs* test had been modified by *Ginzburg v. United States* (1966), 383 U.S. 463, 86 Sup. Ct. 942, 16 L. Ed. 2d 31, or *Redrup v. New York* (1967), 386 U.S. 767, 87 Sup. Ct. 1414, 18 L.Ed. 2d 515. We recognized that *Ginzburg* added a theory that evidence of pandering and the method of the description was relevant to the determination of the dominant purpose of the material and that *Redrup* did not

foreclose a finding of obscenity even though the allegedly obscene material was not pandered or sold to minors or so obtrusively displayed as to cause unwilling viewers to see it. *Miller* has not affected these decisions.

In *State v. Kois* (1971), 51 Wis. 2d 668, 188 N.W. 2d 467,* we stated that whether this court was required to or not it had accepted the *Roth* test as modified by *Memoirs.* In that case the court affirmed the trial court's finding that an issue of Kaleidoscope, a newspaper, was obscene. We also recognized that the test of obscenity for constitutional purposes was in a state of flux and the court had followed what had appeared to be from time to time the majority or the plurality view of the Supreme Court of the United States. The cases since *Kois* have referred to and followed the *Roth-Memoirs* test.[2]

However, not all of the steps constituting the procedure for determining obscenity were followed. In *Court v. State* (1971), 51 Wis. 2d 683, 188 N.W. 2d 475, 000 U.S. 000, 93 Sup. Ct. 3032, 37 L.Ed. 2d 1023,[3] we abandoned an independent review on appeal and fashioned a new test for

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* rev'd sub nom.,Kois v. Wisconsin (1972), 408 U.S. 229, 92 Sup. Ct. 2245, 33 L. Ed. 2d 312.

[2] *Court v. State* (1971), 51 Wis. 2d 683, 188 N.W. 2d 475; *State v. I, A Woman-Part II* (1971), 53 Wis. 2d 102, 191 N.W. 2d 897; *Orito v. State* (1972), 55 Wis. 2d 161, 197 N.W. 2d 763; *State v. Simpson* (1972), 56 Wis. 2d 27, 201 N.W. 2d 558; *State v. Bruesewitz* (1973), 57 Wis. 2d 475, 204 N.W. 2d 514.

[3] We have considered the remand of *Court v. State, supra,* and have ordered counsel to submit their respective views on what this court's position should be in the light of *Miller* on (1) the scope of independent review and (2) the geographical area of community standards.

scope of review in obscenity cases, concluding, p. 698, that "...the free-speech interest will be protected by the courts of this state when juries are strictly enjoined to follow the constitutional standards of *Roth* in making the initial determination of obscenity and when such findings are sustained on an appeal only when there is substantial evidence, in view of the record as a whole to reach that conclusion."

However, an independent review is required in *Miller* (p. 1615):

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

The majority of the court believes that the scope of the independent review is not at issue here and would not reach the question of the scope of the independent review. The court, therefore, reserves the question.

Miller rejected "contemporary community standards" on a national scale as unworkable. This court has never accepted a national community standard. *State v. Kois, supra; McCauley v. Tropic of Cancer, supra.* The majority of the court does not reach the question of what constitutes community standards and, therefore, reserves the question.

In *Paris Adult Theatre I v. State, supra,* the United States Supreme Court held that it was not error to fail to require expert evidence that certain materials are obscene when the materials themselves are placed in evidence. Prior to these decisions, this court expressly held in *Amato, in* Court,

and in *I, A Woman* that it was not error to reject expert evidence that certain material was obscene according to community standards when the material itself was placed in evidence.[6]

Chobot claims *Miller* changed the standard which required the obscene material to be "utterly without any redeeming social value" to require that the material lack "serious artistic, political or scientific value." The "utterly without" part of the *Roth-Memoirs* test was never strictly followed by this court. As pointed out in the concurring opinion in *Voshart*, this test was a misapplication of the language in the original *Roth* decision and the word "utterly" added nothing to the word "without". In *Court*, the court took the view that the value which might save obscene material and cloak it with a constitutional protection must be social and must be redeeming and such words "carry the implicit connotation of a fact-finder's value judgment. They are words which suggest a balancing of interest." This view was reiterated in *State v. I, A Woman-Part II, supra*, at pp. 118, 119, in which it was stated:

> "Nor do we believe that the value that will redeem a prurient piece that affronts contemporary community standards is a miniscule value, a mere scintilla of social value, an 'iota,' or infinitesimal value. If the material is objectionable on the first two

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[6] *Paris Adult Theater* cited *State v. Amato, supra, cert. denied sub nom. Amato v. Wisconsin* (1972), 404 U.S. 1063, 92 Sup. Ct. 735, 30 L. Ed. 2d 751. While the supreme court expressly reserved judgment in *Paris Adult Theater* on the question of whether the trier of fact is capable without expert testimony of determining the prurient appeal of material directed at a bizarre deviant group (a problem posed by *Mishkin v. New York* (1966), 383 U.S. 502, 86 Sup. Ct. 958, 16 L. Ed. 2d 56), this reservation is no longer relevant under *Miller* because the test is the average man.

> Roth-Memoirs standards, it will be redeemed only by a social value that is discernible to a reasonable finder of fact, is demonstrable, and not conjectural. It should pervade the material, and cannot appear as noble platitudes with a social message unrelated to the uniform tenor of the material. The third standard of the *Roth-Memoirs* test presupposes that the qualities that purport to save the material as evincing redeeming social value are not mere makeweight contributed to avoid the operation of the rule."

In *McCauley v. Tropic of Cancer, supra,* this court took the view that a literary work had to have a "serious purpose" and we stated: "We are of the opinion that where a work of apparent serious purpose is involved, the scale will not readily be tipped toward a determination of obscenity." Thus this court in its construction of the *Roth* test required a serious purpose to constitute social value. So far as Wisconsin is concerned, all *Miller* has done is to limit the concept of "social value" to a more restrictive literary, artistic, political or scientific sense; all of which are of social value. Consequently, *Miller* made no substantial change in this respect in the Wisconsin interpretation.

The only deficiency in sec. 944.21 (1) (a), Stats., is that it does not contain an express definition of obscenity in terms of sexual conduct and our previous opinions have not expressly so limited obscenity. The question is whether this court can now save the section by interpretation and supply a constitutional definition of obscenity. It is argued by Chobot

that this court cannot because its previous interpretations have become a part of the statute under the doctrine "A decision construing a statute becomes an integral part of the statute itself."[7] This doctrine, frequently followed by the court, has also been honored in its breach. There have been times when this court has changed its construction of a statute without referring to the doctrine. The doctrine is not all-embracing and it may well apply only to the construction of words which have a static meaning and are so used. However, words which carry constitutional implications stand on a different footing, and when a word, such as obscenity, is used without an expressed definition in the statute, the legislature must intend the courts to furnish its meaning from time to time as the constitutional concept of that word varies. The constitution is a living document and words in statutes dependent upon the constitution must be no less elastic. Under this theory, this court interpreted "obscenity" first in terms of *Roth* and then modified its interpretation in terms of *Memoirs*. *See, e.g., State v. Voshart, supra,* and *State v. Kois, supra.* If the alleged doctrine of statutory interpretation were strictly applied, this court could not have adopted *Memoirs'* modification. It may be that the doctrine prevents a complete reversal of interpretation, but we do not reach that issue because here we make only a refinement or modification of meaning to keep the statute from being unconstitutional.

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[7] *Milwaukee County v. City of Milwaukee* (1933), 210 Wis. 336, 246 N.W. 447; *Thomas v. Industrial Commission* (1943), 243 Wis. 231, 10 N.W. 2d 206; *Zimmerman v. Wisconsin Electric Power Co.* (1968), 38 Wis. 2d 626, 157 N.W. 2d 648. In *Zimmermann,* this doctrine was explained as resting on the principle that once the court has perceived and enunciated the unchanging historical fact of legislative intent, legislative acquiescene in the court's interpretation amounts to acknowledgment that the court was correct. Since legislative intent is a historical concept, once discerned and acquiesced in, it cannot later be said to be something else.

Besides, this court has the duty to uphold the statute if it can and in the past has supplied deficiencies to save a statute. *See Huebner v. State* (1967), 33 Wis. 2d 505, 147 N.W. 2d 646, where this court granted a judicial hearing in sex deviate cases not provided for by the statute in order to save the statute.

We recognize there is a split of authority in other states on this point. The Supreme Court of Indiana has held its obscenity statute unconstitutional for lack of definition. *Stroud v. State* (August, 1973), 13 Crim Law Reports 2541. On the other hand, in *State* of *Washington v. J-R Distributors, Inc.* (July, 1973), 14 Crim. L. Reports 2206, the washington Supreme Court upheld its state statute prohibiting the sale of obscene material by affording the term "obscenity" an "authoritative judicial construction" pursuant to its understanding of the mandate of *Miller.* In *United States v. Thevis* (September, 1973) 14 Crim. L. Reports 2026, the Fifth Circuit Court of Appeals took the position that the specific descriptions of sexual conduct demanded of a statute by *Miller* can be supplied by authoritative judicial construction. That is precisely what the United States Supreme Court did itself in *Twelve 200-Foot Reels of Super 8 MM. Film* (1973), 000 U.S. 000, n. 7, 93 Sup. Ct. 2665, 2670, n. 7, 37 L.Ed. 2d 500. The Ohio Supreme Court in Keating v. "Vixen" (Sept. 26, 1973), 14 Crim. L. Reports 2041, has construed its obscenity statute to comport with the standards enunciated in *Miller. See also People v. Enskat* (August, 1973), Calif. Court of Appeals, Second Appellate Distr., 13 Crim. L. Reports 2522; and *Rhodes v. Florida* (Fla. Sup. Ct., Sept. 1973) Case No. 41-416.

Additional support for the proposition that this court may now construe the statute to comport with the *Miller* formulation of obscenity may be found in *Miller* itself, p. 2615, n. 6:

> "We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore, or *hereafter*, may well be adequate. *See United States v. 12-200 Ft. Reels Film*, _____U.S._____, p._____, n. 7, 93 S. Ct. 2665, p. 2670, n. 7 36 L. Ed. 2d _____ (1973)."

Consequently, *Miller* did not reverse the lower court but "vacated and remanded for further proceedings." The court directed the remand court to conduct further proceedings in a manner "not inconsistent with the First Amendment standards established by this opinion." *Miller* at 2622. In *Paris Adult Theater*, a companion case to *Miller*, the court stated:

> "In light of these holdings, nothing precludes the state of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia Law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California* . . ."

Again, the United States Supreme Court's mandate reads "Vacated and remanded for further proceedings." This mandate appears in all the *Miller* companion cases. Significantly, at the conclusion of each opinion, where the remand court is directed to conduct further proceedings not inconsistent with the First Amendment standards established by *Miller*, the Supreme Court cites *United States v. 12-200 Ft. Reels* (1973), – U.S. – p. _____, n. 7, 93 Sup. Ct. 2665, 2670, n. 7, 36 L. Ed. 2d 500. This footnote reads:

> " We further note that, while we must leave to state courts the construction of state legislation, we do not have a duty to authoritatively construe federal statutes . . . If and when a 'serious doubt' is raised as to the vagueness of the word 'obscene,' 'lewd,' 'lasciuious,' 'filthy,' 'indecent', or 'immoral,' as used to describe regulated material in 19 U.S.C. sec. 1305 (a) and 18 U.S.C. sec. 1462 . . .we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller v. California, supra,* 2615-2616 . . .Of course, Congress could always define other specific 'hard-core' conduct."

Thus it appears the United States Supreme Court has in effect construed the federal statute and has invited state appellate courts to construe their obscenity statutes to comport with the *Miller* standards.

We conclude this court has the power and the duty to define "obscenity" in terms of minimum standards to save the statute. If the legislature of Wisconsin desires to modify or add to such definition, it certainly has the power to do so. We, therefore, construe the word "obscene" in sec. 94421 (1) (a), Stats., to mean works which depict or describe sexual conduct, and (1) which taken as a whole appeal to the prurient interest in sex, (2) which taken as a whole portray sexual conduct in a patently offensive way and (3) which taken as a whole do not have serious literary, artistic, political or scientific value. Whether a work appeals to the prurient interest and whether it depicts or describes sexual conduct in a patently offensive way and whether it has serious literary, artistic, political or scientific value are to be determined by its effect upon the average person applying contemporary community standards. Sexual conduct is defined to be acts of sexual intercourse between humans, normal or perverted,

actual or simulated, acts of masturbation, fellatio, cunnilingus, and acts of excretory function, lewd exhibition of the genitals especially is a stimulated condition and sexual relations between humans and animals. As thus authoritatively construed, sec. 944.21 (1) (a) meets the test postulated by *Miller*.

The last argument of Chobot is that this court's construction of sec. 944.21 (1) (a), Stats., to comport with *Miller* cannot apply to him because he had no fair warning of such construction.

Chobot cites *Bouie v. Columbia* (1963), 378 U.S. 347, 84 Sup. Ct. 1697, 12 L.Ed. 2d 894, for the proposition that the construction may not apply. Justice Douglas cited this case for the same proposition in his dissent in *Miller* (p. 2624). However, since the mandates in *Miller, Paris Adult Theatre I, Twelve 200-Foot Reels,* and *Orito,* and companion cases, did not reverse but only vacated and remanded the cases for further proceedings not inconsistent with *Miller,* it would appear the supreme court intended its latest expression of the standards to be applied to offenses committed prior to its announcement in *Miller.* The supreme court has long recognized that once a limiting construction of a criminal statute is rendered which is sufficient to rehabilitate the potential vagueness of the statute, such construction may be applied to punish conduct occurring prior to the construction. *Dombrowski v. Pfister* (1965), 380 U.S. 479, n. 7, 85 Sup. Ct. 1116, 14 L. Ed. 2d 22; *Poulos v. New Hampshire* (1953), 345 U.S. 395, 73 Sup. Ct. 760, 97 L.Ed. 1105; *Cox v. New Hampshire* (1941), 312 U.S. 569, 61 Sup. Ct. 362, 85 L.Ed. 1949; *Winters v. New York* (1948), 333 U.S. 507, 68 Sup. Ct. 665, 92 L.Ed. 840. This doctrine, however, is subject to the limitation that such application affords fair warning to the defendant. *Lauzetta v. New Jersey* (1939), 306 U.S. 451, 59

Sup. Ct. 618, 83 L.Ed. 888; *see also Younger v. Harris* (1971), 401 U.S. 37, 51, 91 Sup. Ct. 746, 27 L.Ed. 2d 699. *Douglas v. Buder* (1973), 000 U.S. 000, 93 Sup. Ct. 2199, 37 L.Ed. 2d 52.

The *Bouie Case* relied on by Chobot states substantially the same rule.

> "...when ...[an] *unforeseeable* state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of *fair warning* that his contemplated conduct constitutes a crime. *Bouie v. California, supra,* at 354, 355.

The question thus is whether the foregoing construction was so unforeseeable as to proclude its retoractive application to punish conduct occurring prior to the rendition of this construction.

Some trial courts in decisions rendered subsequent to *Miller* have discussed the retroactivity issue without deciding it. *See Hamar Theatres, Inc. v. Cryan,* Civil Action No. 472-773 (D. N.J. July 26, 1973); *Literature, Inc. v. Quinn* (No. 73-1074 (1st Cir., July 26, 1973); *Papp v. State,* No. 70-1077, 71-917 (August 6, 1973) (Dist. Ct. of Appeals, Fla. 4th Dist.): *United States v. Lang,* No. 10712-HP-CD (C.D. Cal. July 18, 1973). *See also Rhodes v. Florida* Case No. 41-416.

However, in our view, *Miller* has not made such drastic changes in the law of obscenity that the now *Roth-Memoirs-Miller* test needs to be specifically brought to the attention of all persons before it can be said that the ntoice comports with due process. The changes and modifications wrought by *Miller* are not so substantial in view

of this court's prior interpretations of the statute that due process requires that a defendant be given notice of the latest modifications. Now are the changes so serious as to mislead one intent on obeying the law. Chobot has not yet been tried so we do not know what the evidence may show, but the definition of obscenity in *Miller* covers less ground than the previous interpretation of the statute by this court and in that respect Chobot cannot be hurt and should be tried under the interpretation of sec. 944.21 (1) (a), Stats., herein declared.

While the state argues that Chobot's conduct might permissibly be judged according to the *Roth-Memoirs* test since it occurred prior to the *Miller* opinion, we concluded this is contrary to the mandates. The mandates in *Miller, Paris Adult Theater, Twelve-200-Foot Reels*, and companion cases, leave no doubt that the *Miller* test rather than the *Roth-Memoirs* test should be applied in the further proceedings; *a fortiori* the *Roth-Memoirs-Miller* test should be applied to other pending cases.

By the Court. – The petition for a writ of prohibition is denied.

HALLOWS, C.J. (*dissenting, in part*) I would reach the question of the scope of the independent review by this court and also state what this court has held community standards to mean. It is not a question of reaching community standards. *Miller* has not changed our prior decisions on this question. When this court heard this case in its initial stage as a motion, it decided to change the proceeding to one for an original action. I thought it was intended that the opinion would answer all the questions raised by *Miller* so that this case and other pending cases could be tried with some degree of certainty if we held the statute constitutional.

There is no question that the scope of the independent review must include all th elements of obscenity. This court cannot make a review of part of a constitutional concept and have different tests for another part of the concept. Due process under *Miller* requires that this court exercise its independent judgment in reviewing a determination that material is obscene in the constitutional sense and this review must encompass all three elements which make up the concept of obscenity.[1] In an independent review, this court is not bound by such appellate rules as "credible evidence to sustain the verdict," "the great weight and clear preponderance" or any other limiting rule.[2] These are now only factors which may be considered in exercising the court's independent judgment. The United States Supreme Court in it s obscenity decisions on independent review has not been bound by ordinary appellate review rules.

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[1] The quoted directive from *Miller* at p. 2615 must be considered in the light of the court's later statement that the application of community standards to arrive at a determination of what appeals to the prurient interest or is patently offensive constitutes a factual determination. Considering the authority cited by *Miller* and in light of *Kois v. Wisconsin*, each element of the obscenity test calls for the determination of a "question of constitutional fact," which must be independently reviewed by the appellate court. *See Miller* at 2615, citing *Kois v. Wisconsin*, 408 U.S. at 232; *Memoirs v. Massachusetts, supra*, 383 U.S. at 232 (Harlan, J., dissenting); *also Watts v. Indiana* (1949), 383 U.S. 49, 51, 69 Sup. Ct. 1347, 93 L. Ed. 1801, wherein it is stated: "... 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this court's adjudication."

[2] *See Court v. State* (1971), 51 Wis. 2d 683, 188 N.W. 2d 475.

I see no problem on contemporary community standards. This court never did accept the concept of national community standards.[3] State v. Kois (1971), 51 Wis. 2d 668, 188 N.W. 2d 467; *McCauley v. Tropic of Cancer* (1963), 20 Wis. 2d 134, 121 N.W. 2d 545. Therefore, *Miller* has not changed the Wisconsin law as it existed prior to that decision. Nor do I read *Miller* as requiring local standards. The Wisconsin law was a statewide standard, not local.

Community standards must be statewide. If we adopt local standards, are they to be on a city basis, county basis, circuit court basis, or some other basis? Should something be determined not obscene in Milwaukee and yet be obscene in Pepin county; Is there to be a separate standard for metropolitan areas different from rural areas? Are the federal courts in Wisconsin to follow the community standards of the state courts or is there to be one standard in the Eastern District and another in the Western District because the injuries are drawn from different districts? If the jury is waived, what then is the area of the local standard? If a national standard is unworkable, as *Miller* says it is, I find a local standard much more unworkable than national standards.

In *Tropic of Cancer* and in *Kois* this court committed itself to statewide community standards. This court applied a

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[3] This requirement that juries apply some mythical national standard first originated in the opinion of Justices Brennan and Goldberg in *Jacobellis v. Ohio* (1964), 378 U.S. 184, 84 Sup. Ct. 1676, 12 L. Ed. 2d 793. They argued that application of a local community standard would have the "intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Jacobellis v. Ohio, supra,* 193, quoting from *Manual Enterprises v. Day* (1962), 370 U.S. 478, 488, 82 Sup. Ct. 1432, 8 L. Ed. 2d 639 (opinion of Harlan, J.).

statewide standard on the reasoning, subsequently accepted by the United States Supreme Court in *Miller*, that anything else would be unworkable. Since sec. 269.565 (6), Stats.,[4] permitted a judgment of obscenity to be used collaterally in a criminal trial in some cases, the standard could not be less than statewide. If Wisconsin does not have a statewide standard, this statute is emasculated. The majority members, by not reaching this question and so stating, leave the impression that perhaps local standards are justified. This approach not only furnishes no guidance but invites appeals.

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[4] "269.565 Declaratory judgments against obscene matter. . .

(6) Admissibility in criminal prosecutions. In any trial for a violation of s. 944.21 or 944.22, the proceeding under this section and the final judgment of the circuit court under sub. (3) or (5) or the interlocutory adjudication under sub. (lm), shall be admissible in evidence on the issue of the obscenity of said matter and on the issue of the defendant's knowledge that said matter is obscene; provided, that if the judgment of the court sought to be introduced in evidence is one holding the matter to be obscene, it shall not be admitted unless the defendant in said criminal action was served with notice of the action under this section, or appeared in it, or is later served with notice of the judgment of the court hereunder, and the criminal prosecution is based upon conduct by said defendant occurring more than 18 hours after such service or such appearance, whichever is earlier."

No. St. 179

August Term, 1973

STATE OF WISCONSON: IN SUPREME COURT

State of Wisconsin ex rel. JOSEPH CHOBOT,
Petitioner,
v.

CIRCUIT COURT FOR MILWAUKEE COUNTY,

THE HONORABLE HERBERT J. STEFFES,
CIRCUIT JUDGE, Presiding,
Respondent.

WILKIE, J. (*Concurring*): I would reach the question of the scope of the independent review by this appellate court and join in the separate opinion of Mr. Chief Justice Hallows as to the scope of that review. Agreeing with the majority I would not at this point reach the question of the geographical area of the community standards.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

CARL R. CARTER
ACADEMY FILMS CORPORATION
DONALD A. DAVIS
DONALD A. DAVIS PRODUCTIONS, INC',
DONALD KLEIN and
HARLAN DAGEL

CRIMINAL CR 72-207

MEMORANDUM DECISION

In this indictment, the defendants are charged with the transportation of obscene movies in interstate commerce by means of a common carrier in violation of 18 U.S.C. § 1462 and with transportation of obscene movies in interstate commerce for the purpose of distribution in violation of 18 U.S.C. § 1465 and with conspiracy to violate the aforesaid statutes in violation of 18 U.S.C. § 371. There are in the indictment eighty-seven substantive counts and one conspiracy count which alleges ninety-six overt acts. The transportation of movies alleged is transportation from Memphis to Chicago, Memphis to Portland, Oregon, and Memphis to Indianapolis, and Chicago to Memphis, and Clarksville, Tennessee to Oak Grove, Kentucky. There are over thirty movies involved.

This Court has heretofore heard and overruled certain pre-trial motions but has taken under advisement the motion to dismiss upon the grounds herein dealt with.

Defendants have moved to dismiss the indictment on these grounds. First, that the decisions of the Supreme Court of June, 1973 may not be "applied retroactively" to the conduct which is the basis of this indictment because such conduct occurred prior to those decisions. Second, that since the Supreme Court held in those decisions that there is no national standard and that since only a national standard could be applied under these federal interstate transportation statutes, there is no available standard that could be applied in a trial charging violation of these statutes; or alternatively, that if a local standard could be applied, it would not be the standard of this locality and that therefore a jury here could not apply the applicable standard.

This Court has considerable doubt as to the validity of these contentions,[1] and since there are approximately ten other cases in this jurisdiction in which the same issues are raised, we are of the opinion that it would be well to have these issues resolved prior to the trial of these cases. Accordingly, this Court has decided to grant defendants' motion to dismiss in this case alone on both of these grounds so that the Government may appeal and obtain a resolution of these issues.

The Clerk will enter a judgment dismissing this indictment.

ENTER this 12th day of December, 1973.

/s/ CHIEF JUDGE

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[1] At the present time, it appears that there are decisions both ways as to each contention.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
JACKSON SEPTEMBER, 1973

RALPH MITCHUM,
Plaintiff-in-Error

v.

STATE OF TENNESSEE,
Defendant-in-Error

No. 10
Shelby County
Hon. John P. Colton, Judge
(Violation T.C.A. § 39-3003,
selling obscene matter, on
remand from U.S. Supreme Court)

For the Plaintiff-in-Error:

Walter Lee Bailey, Jr.
Memphis, Tennessee

Robert Eugene Smith
Baltimore, Maryland

Gilbert H. Deitch
Atlanta, Georgia

For the Defendant-in-Error:

David M. Pack
Attorney General

C. Hayes Cooney
Assistant Attorney General

Opinion
Filed: November 20, 1973

AFFIRMED

WILLIAM S RUSSELL,
Judge

OPINION

This case is before us a second time, having been remanded to this Court by the United States Supreme Court. The plaintiff-in-error, Ralph Mitchum, was charged and convicted of knowingly possessing, displaying, exhibiting and selling a certain obscene magazine in violation of the proscriptions of Tennessee Code Annotated § 39-3003, and his punishment set at one day in jail and a fine of five thousand dollars ($5,000.00). On his appeal in the nature of a writ of error to this court, we affirmed the conviction by an unpublished opinion filed on September 29, 1971. Certiorari was denied by the Tennessee Supreme Court, without opinion, on February 7, 1972; but was granted by the United States Supreme Court on June 25, 1973. Subsequently and contemporaneously with the restatement of the Constitutional Law on the subject of obscenity and the like disposition of some sixty-eight such cases, the United States Supreme Court

vacated our judgment and remanded the case to this court "for further consideration in light of Miller v. California, _____U.S._____(1973); Paris Adult Theatre I v. Slaton, _____U.S._____(1973; Kaplan v. California, _____U.S._____, (1973); U.S. v. 12,200 ft. Reels of Super 8mm Film, _____U.S. (1973); U.S. v. Orito, _____U.S. _____ (1973); Heller v. N.Y., _____U.S._____; (1973); Roaden v. Ky., _____U.S. _____ (1973); and Alexander v. Virginia, _____U.S._____(1973)." It was further said: "The cause is remanded to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, ***". The compliance with the mandate, we ordered the cause again docketed for oral argument, which has been heard; and briefed in the light of its present posture and the new United States Supreme Court decisions.

It is our view that the only rational purpose for the remand to this Court was for us to look to our statutes dealing with obscenity to determine what construction they have been given and/or shall have. If our statutes were facially overbroad or otherwise unconstitutional, it seems to us that a remand would have been unnecessary. We believe that if our obscenity statutes as construed conform to the new rules that they are valid. It seems obvious that the only purpose for the remand in this case was for the appropriate State court to pronounce an authoritative construction of these statutes. If that construction passes the new constitutionality tests set out in *Miller v. California*, _____U.S._____, 37 L.Ed. 2d 419, 93 S.Ct., _____, then this conviction may again be affirmed. Obviously other jurisdictions have been faced with this post-*Miller* question. While the Indiana Supreme Court has held in *Stroud v. State*, 13, Cr.L.2541, that its pre-Miller obscenity statute is unconstitutional because it doesn't

describe what acts shall be considered obscene, other jurisdictions have taken a view more in harmony with this Court. See *People v. Enskat,* (California), 13 Cr. L.2522; *State v. J-R Distributors, Inc.* (Washington), 14 Cr.L.2006; *U.S. v. One Reel of Film,* (U.S. First Circuit), 13 Cr.L.2482; and *U.S. v. Thevis*(U.S. Fifth Circuit) 14 Cr.L.2026. It is necessary, therefore, that we look to our statutes, their history and their meaning.

T.C.A.§ 39-3001 dated back to the Code of 1848, and sought to proscribe the printing, publishing, importing, selling or distributing of obscene material. However, this statute was declared unconstitutional by the Tennessee Supreme Court on November 12, 1964, in the case of *Ellenburg v. State,* 215 Tenn. 153, 384 S.W.2d 29, for want of an express requirement of scienter. A new statute was therefore mandated, and the Legislature promptly acted during its 1965 session to not only repeal the invalid statute, but also to pass the statutes that we are now construing. The first of these was T.C.A. § 39-3003, which says, in pertinent part:

> "* * * It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material.* * *"

The second statute passed at that time and which we need to look to for guidance on the question of Legislative intent as to what was sought to be proscribed is T.C.A. § 39-3006, and it says in pertinent part:

"* * *In any action or prosecution under * * * any laws of this state wherein the question of the obscenity of any material is an issue, it shall be admissible in evidence, among other things, to show:

(a) the character of the audience for which the material was designed or to which it was directed.

(b) what the predominant appeal of the material would be for ordinary persons; and what effect, if any, it probably would have on the conduct of such persons;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(f) the good repute of the author, creator, publisher or other person from whom the material originated, which evidence of good repute may be rebutted by the prosecution.* * *"

Finally, our Legislature in T.C.A.§ 39-3007 set about to define obscene material, in these words:

"Obscene material: Any material, matter, object or thing, including but not limited to, any written or printed matter, film, picture, drawing, or any object or thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition, (a) it is patently offensive to the public or if it goes substantially beyond customary limits of candor in describing or representing such matters, and (b) it is devoid of any literary, scientific or artistic value and is utterly without social importance. The phrase 'predominant appeal' shall be considered with reference to ordinary persons."

It is more than coincidence that the language of these statutes parrots language of the United States Supreme Court, written by the Justices in a multiplicity of cases as they struggled to define constitutionally controlable obscenity. See, for example, *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct.1304 (1957). Our Legislature obviously desired and intended to control traffic in obscenity to the fullest extent possible without running afoul of First Amendment and other Constitutional guarantees. The language used was chosen hopefully to accomplish that purpose. The root of the present problem is that in recent years before the *Miller v. California* decision we have not had a majority of the U.S. Supreme Court to agree upon words to define obscenity. See, for examples, *Memoirs v. Massachusetts*, 383 U.S.413, 16 L.Ed.2d. 1, 86 S.Ct. 975 (1966), and *Redrup v. New York*, 386 U.S. 767, 18 L.Ed. 2d 515, 87 S.Ct.1414 (1967). Our statutory definition of obscenity (T.C.A.§ 39-3007), although passed in 1965, is remarkably similar in language to the three-pronged test enunciated by the plurality in *Memoirs*, supra, the following year. It is apparent that our Legislature made a conscious effort to define obscenity in words that would pass United States Supreme Court examination for constitutionality. Further definitive guidance has been completely lacking until *Miller*, Etc.

Now, we have for the first time in many years a United States Supreme Court majority definition of obscenity, a statement of what it is that may be lawfully controlled. The permissible scope of such regulation is to works which depict or describe sexual conduct, and that sexual conduct must be specifically defined by the applicable state law (as written or authoritatively construed). *Miller* says that: "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value".

Miller gives the basic guidelines for the trier of fact as (must be): "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value".

Obviously, our statutes as written do not contain specific definitions of the sexual conduct the depiction or description of which may be constitutionally controlled. The United States Supreme Court suggests that two examples of what a state statute could define for regulation are: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

We are of the opinion that it is the depiction or description of sexual conduct that our statutes were clearly designed to apply to, and that the two specific examples given by the Court in *Miller* of what a state could define for regulation are simply the obvious examples of obscenity that immediately come to mind. In fact, the examples seem to cover the subject rather completely. We hold that implicit in the statutory definition of obscenity set out in T.C.A.§ 39-3007 is that it applies only to the depiction or description of sexual conduct; and that included in the statutory definition the trier of fact may find to be obscene (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (b) patently offensive representations or descriptions of masturbation excretory functions, and lewd exhibition of the genitals.

The specificity required by the second branch of the Miller test, i.e. "sexual conduct specifically defined by the applicable state law", may be provided by judicial construction under the express language of *Miller.* Because this requirement has not previously been expounded, the prior decisions of the Tennessee Supreme Court and of this court have not addressed the specificity question directly. In 1967 our Supreme Court decided the case of *Rivieria Arts Theatre v. State,* 219 Tenn.652, 412 S.W.2d 890, involving the motion picture, "London Night Life". A finding by the trial judge that the film was obscene was affirmed, but our Supreme Court did not have the film before it and precisely what was depicted therein does not appear. The title would certainly indicate that it dealt with sexual conduct, and it obviously otherwise fell within the ambit of our statute. In the case of *Robert Arthur Management Corporation v. State,* 220 Tenn.101, 414 S.W.2d 638 (1967), our Supreme Court viewed the motion pictures "Mondo Freudo" and an advertising trailer "Olga's Girls" and pronounced them to be obscene. The Court, as has been customary in dealing with this subject, spared the readers of its opinion the graphic details of what was therein depicted, but instead used this language:

> "[16, 17] We have reviewed the evidence and have seen the film. We agreed with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of

> such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance."

Obviously, in that case our Supreme Court specifically applied the statutes to films, dealing with sexual conduct, and thereunder dealth with "sexual filth", not otherwise specified, so to that extent we have a prior judicial construction of the ambit of the statutes. In the later case of *Art Theatre Guild, Inc. v. State ex rel. Rhodes,* 225 Tenn.399, 469 S.W.2d 669, our Supreme Court, after viewing the film, affirmed the judgment of the trial court in holding that the movie, "Without a Stitch", was obscene. Our Supreme Court did not elaborate upon what was depicted, but quoted the trial court's finding of fact, as follows:

> "That the film 'Without a Stitch' as a whole predominantly appeals to the prurient interest of the ordinary person; that it is patently offensive to the public; goes substantially beyond the customary limits of candor; and is devoid of any literary, scientific, educational, or artistic value; and further is without any social importance or value. This Court further finds as a matter of fact that the film 'Without a Stitch' is obscene under the standards set forth by Tennessee Code Annotated 39-3005."

Obviously, this was a film dealing with sexual conduct. That we were spared the details of the obscenity does not mean that our Supreme Court's holding did not furnish a specific precedent of construction as to the ambit of the statutes.

This court has dealt previously with obscenity cases. See *Larry Grigsby and Jackie Lynn Jones v. State;* filed at Knoxville on September _____, 1973, wherein we affirmed convictions for selling obscene magazines. Even in that case,

decided after *Miller*, we failed to specify the nature of the publications, which were sexually oriented depictions and descriptions of patently offensive ultimate sexual acts, normal and perverted, actual and simulated; and patently offensive representations and descriptions of masturbation and lewd exhibition of the genitals. We simply affirmed the established fact that they were obscene; but the record was available to any member of the public with a curiosity to learn the exact nature of the obscene material.

We adopt the two specific examples of what may be defined for regulation offered by the United States Supreme Court under the second part of the new *Miller* test as being implicit in our statutes, and are now made explicit by this Court. We construe our statutes to incorporate all of the tests of *Miller*. And so construed, they are in all respects constitutional. What *Miller* and its companion cases permit to be regulated as obscene is exactly what our Legislature was striving to control, and what we hold that it did accomplish. While our statute now seems to require more than the constitution, i.e. that the matter be "utterly without social importance"; and the Legislature may desire to amend this phrase now that it is clearly unnecessary to constitutionality; nevertheless, we do not believe that matters of sexual conduct, found to be obscene under the *Miller* tests, actually have any social importance. A careful review of the authorities will show, as was pointed out by Mr. Chief Justice Burger in *Miller*, that "utterly without redeeming social value" was simply what the Court in *Roth* presumed obscenity to be. The language in our Tennessee Supreme Court case of *Robert Arthur Management Corporation v. State*, supra, in which T.C.A. § 39-3007 was construed to mean that a work could not be obscene if it had "a modicum of social value", cites *Memoirs* as the basis for that ruling. The *Memoirs* test, in that particular, is no longer federal Constitutional law, being specifically rejected in *Miller*. We doubt that our Supreme

Court would now require the strict construction then mandated by the plurality of the U.S. Supreme Court. The language of our statute had its roots in *Roth*, not *Memoirs;* and "utterly without redeeming social value" was simply what the Court in *Roth* presumed obscenity to be, and was not a test for it. The whole question becomes somewhat circular when reflected upon, because obscenity as our statutes proscribe it can well be said to be utterly without redeeming social value. When our Tennessee Supreme Court made its construction aforesaid, it was, of course, under the holding of the U.S. Supreme Court in *Memoirs*, and that holding is no longer viable.

Addressing the three specific assignments of error upon this rehearing, we hold (1) that T.C.A.§§ 39-3003 and 39-3007 are not void for vagueness, as now construed; and (2) and (3) that our construction of these statutes is not limited to a prospective application only, and is not ex post facto legislation, but is the law of this case. It is clear to us that the United States Supreme Court implicitly held contrary to plaintiff-in-error's contentions as to all three assignments when it remanded this case to us, rather than dismissing it. The only function that could now be performed in this Court in this case that could not be done there in the U.S. Supreme Court is the initial construction of Tennessee statutes.

Ralph Mitchum is clearly guilty. The magazine that he sold depicted and described sexual conduct, and it included inter alia patently offensive exhibitions of the genitals. It represents "hard-core pornography" that could only be lawfully sold in the total absence of a proscribing statute, or if the First Amendment permitted no such control of obscene matter.

We again affirm the conviction.

/s/ William S. Russell, Judge

CONCUR:

/s/ John A. Mitchell, Judge

/s/ Charles H. O'Brien, Judge

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael G. THEVIS and Peachtree News
Company, Inc., Defendants
Appellants.
No. 71-2614.

United States Court of Appeals,
Fifth Circuit.
Sept. 12, 1973.

Defendants were convicted before the United States District Court for the Middle District of Florida, Fisher, J., 329 F. Supp. 265, of 12 counts of transporting obscene material by common carrier in interstate commerce and they appealed. The Court of Appeals, Bell, Circuit Judge, held that materials in question need not have been distributed to nonconsenting adults, juveniles or generally in a pandering manner to be found obscene, that Government was not required to prove that defendants were aware that materials were legally obscene, that expert testimony concerning prurient appeal, community standards and redeeming social

value was not necessary where materials themselves were available for inspection by finder of fact, and that six of 12 magazines were not utterly without redeeming social value and were not obscene.

Affirmed in part; reversed in part.

1. Obscenity 7

Materials in question need not have been distributed to nonconsenting adults, to juveniles or generally in a "pandering" manner in order to be found obscene. 18 U.S.C.A. § 1462.

2. Indictment and Information 110(19)

Indictment which tracked wording of statute proscribing transportation of obscene material by common carrier in interstate commerce was not insufficient on theory that if failed to specify elements of obscenity. 18 U.S.C.A. § 1462.

3. Obscenity 15, 17

In prosecution for transportation of obscene material by common carrier in interstate commerce, Government met its burden of proving scienter by proving that defendants knew nature of the materials which they had put in interstate commerce; Government was not required to prove that defendants had been aware that the materials were legally obscene. 18 U.S.C.A. § 1462.

4. Criminal Law 13.1(13)

Statute proscribing transportation of obscene material by common carrier in interstate material by common carrier in interstate commerce was not overbroad and invalid on theory that it failed to distinguish between transportation of obscene materials for private use and transportation for commercial distribution. 18 U.S.C.A. § 1462.

5. Obscenity 17

Expert testimony concerning prurient appeal, community standards and redeeming social value was not necessary in prosecution for transportation of obscene materials by common carrier in interstate commerce where materials themselves were available for inspection by finder of fact. 18 U.S.C.A. § 1462.

6. Courts 100(1)
Criminal Law 1187

"Memoirs" obscenity standard which was applicable prior to United States Supreme Court decision concerning concrete guidelines to isolate materials depicting or describing patently offensive hard core sexual conduct from expression protected by the First Amendment could be applied after the decision to determine obscenity of materials involved in transactions occurring prior to the decision and, in determining whether materials in question were obscene, Court of Appeals would consider both prior and subsequent definitions of obscenity and any count based on a magazine not obscene under both standards would be dismissed. 18 U.S.C.A. § 1462; U.S.C.A.Const. art. 1, § 9; Amend. 1.

7. Criminal Law 13.1(13)

Statute proscribing transportation of obscene material by common carrier in interstate commerce satisfied requirement that it specifically define sexual conduct whose depiction or description is restricted under United States Supreme Court decision even though statute, on its face, did not contain the requisite specifies, as obscenity definition had been added to statute by judicial gloss. 18 U.S.C.A. § 1462; U.S.C.A.Const. Amend. 1.

8. Obscenity 5

Inclusion of literary matter in significant proportions in magazines precluded finding that magazines were "utterly

without redeeming social value" and, therefore, magazines were not obscene even though pictures contained in them would have been found obscene standing alone. 18 U.S.C.A. § 1462; U.S.C.A. Const. Amend. 1.

Robert E. Smith, Atlanta, Ga., Norman J. Abood, Jacksonville, Fla., for defendants-appellants.

John L. Briggs, U.S. Atty., Jacksonville, Fla., Richard C. Owens, Atty., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Before JOHN R. BROWN, Chief Judge, and BELL and SIMPSON, Circuit Judges.

BELL Circuit Judge:

Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 U.S.C.A. § 1462.[1] Jury trial was waived. The subject matter of each count was a particular magazine

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[1] 18 U.S.C.A. § 1462 (1966):
Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce –

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense. . . .

and appellants were convicted on each of the counts. The district court, 329 F.Supp. 265, found that the material in question, i.e., each magazine, was obscene under the three-pronged test of *Memoirs*.[2] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. Redrup v. New York, 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing that they were obscene in the constitutional sense; (4) that 18 U.S.C.A. § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient

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[2] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

to support the lower court's finding on the issue of obscenity vel non. We will treat these two elements as separate assignments of error.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First Amendment. Miller v. California, 1973, _____ U.S. _____, _____ 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, 432; Paris Adult Theatre I v. Slaton, 1973, _____ U.S. _____ 93 S.Ct. 2628, 37 L.Ed.2d 446; United States v. Orito, 1973, _____ U.S. _____ 93 S.Ct. 2680, 37 L.Ed.2d 492; United States v. 12 200-Ft. Reels of Super 8 mm Film, 1973, _____ U.S. _____ 93 S.Ct. 2665, 37 L.Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of the new standard would be violative of the Ex Post Facto clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 U.S.C.A. § 1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller*, that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to test the materials for obscenity under any standard. We reject this

broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We sreserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

[1] Appellants' first assignment of error in that the materials in question should not be tested under a standard as restrictive of pornography[3] as *Memoirs*. Rather they urge a standard arguably suggested in Redrup v. New York, supra, requiring for a finding of obscenity that the materials be distributed to nonconsenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*, ____ U.S. at ____ 93 S.Ct. at 2618, 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such a

[3] "Pornography" derives from the Greek (*porne*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of crotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Finally, we note that the origin of the "pandering" concept is Ginzburg v. United States, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467 – 476, 86 S.Ct. 942.

[2] Appellants' second argument is that the indictment, which tracked the wording of 18 U.S.C.A. § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; Downing v. United States, 5 Cir., 1965, 348 F.2d 594, 599. See also Esperti v. United States, 5 Cir., 1969, 406 F.2d 148; Bland v. United States, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*. Further,

[4] Roth v. United States, 1957, 354 U.S. 476, 77 S.Ct.1304, 1 L.Ed.2d 1498.

in *Roth* the Court held that the words used in 18 U.S.C.A. § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

[3] Appellants' third contention deals with the scienter necessary for conviction under 18 U.S.C.A. § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on Smith v. California, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in Rosen v. United States, 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: United States v. West Coast News Company, 6 Cir., 1966, 357 F.2d 855, rev'd on other grounds, Aday v. United States, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; Schindler v. United States, 9 Cir.,

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[5] The sufficiency of an indictment tracking the words of 18 U.S.C.A. § 1462 was challenged in United States v. Luros, N.D. Iowa, 1965, 243 F.Supp. 160, rev'd on other grounds, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-167.

1953, 208 F.2d 289. See also Kahm v. United States, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

[4] The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from Stanley v. Georgia, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by United States v. Thirty-Seven Photographs, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and United States v. Reidel, 1971, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by United States v. Orito, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

[5] The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in United States v. Groner, 1973, 479 F.2d 577 (En banc), that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in Paris Adult Theatre I v. Slaton, supra, _____ U.S. at _____ 9 S.Ct. at 2634, 37 L.Ed.2d at 456. See also Kaplan v. California, supra, _____ U.S. at _____, 93 S.Ct. at 2684, 37 L.Ed.2d at 498.

II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

> "(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interst," (citations omitted)
>
> (b) whether the work depcits or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito,* supra, and *12 200-Ft. Reels,* supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by climinating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment incursions, the *Miller* standard requires that regulatory statutes define specific sexual conduct to whose depiction or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 U.S.C.A. § 1462 are subject to such construction. See *12 200 Ft. Reels,* supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,[6] the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of Kaplan v. California, supra (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

[6] We decline to read so much into *Miller.* Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be reexamined in light of its clarification of previous standards and its declaration of new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ___ U.S. at ___, 93 S.Ct. at 2618, 37 L.Ed.2d at 435.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of

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[6] Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

Memoirs permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs,* because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller,* ___ U.S. at ___ 93 S.Ct. at 2613, 37 L.Ed.2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.,* at ___ 93 S.Ct. at 2619, 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller.* Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir. 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the

benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by Miller v. United States, 1973, ___ U.S. ___ ,93 S.Ct. 3030, 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See Miller v. United States, 9 Cir. 1970, 431 F.2d 655.

[7] Therefore, before we consider the question of obscenity *vel non*, and because we do not apply the *Miller* standard, we must address ourselves to the question whether 18 U.S.C.A. § 1462 can satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd, lascivious, or filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12-200 Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently

[7] We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in *Miller* . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under Jacobellis v. Ohio, supra, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

[8] In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by the *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter.

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[8] These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals."

Miller, ___ U.S. at ___, 93 S.Ct. at 2615, 37 L.Ed.2d at 431.

TABLE I

	Memoirs			*Miller*		
	(a)	*(b)*	*(c)*	*(a)*	*(b)*	*(c)*
Magazine Titles	*Dominant theme, taken as a whole, appeals to a prurient interest in sex*	*Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters*	*Utterly without redeeming social value*	*The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest*	*Patently offensive depiction or description of sexual conduct specifically defined by applicable statute*	*Taken as a whole, lacks serious literary, artistic, political or scientific value*
Boys and Their Male Lovers	Yes	Yes	No	Yes	Yes	Yes
Duo	Yes	Yes	Yes	Yes	Yes	Yes
Domino	Yes	Yes	Yes	Yes	Yes	Yes
Love Knot	Yes	Yes	Yes	Yes	Yes	Yes
Wanton	Yes	Yes	Yes	Yes	Yes	Yes
My Boys	Yes	Yes	Yes	Yes	Yes	Yes
In & Its Nice	Yes	Yes	Yes	Yes	Yes	Yes
Girlfriends	Yes	Yes	No	Yes	Yes	Yes
Pussy Willow	Yes	Yes	No	Yes	Yes	Yes
Arcadia	Yes	Yes	No	Yes	Yes	Yes
Teenage Jaybirds	Yes	Yes	No	Yes	Yes	Yes
Cloud 9	Yes	Yes	No	Yes	Yes	Yes

Indeed, the pictures in each instance are the principle content of the magazines and would, standing alone, be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

Affirmed in part; reversed in part.

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert E. COTE, Defendant
Appellant.

No. 72-2417

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1973.

Rehearing Denied Nov. 9, 1973.

Defendant was convicted in the United States District Court for the Northern District of Texas, Leo Brewster, Chief Judge, of mailing obscene films, magazines and circulars in violation of statute, and he appealed. The Court of Appeals, Fifth Circuit, 470 F.2d 755, affirmed, and certiorari was granted. The Supreme Court, ___ U.S. ___, 93 S.Ct. 3061, 37 L.Ed.2d 1037, remanded the cause for further consideration in light of its recent decisions in the area of obscenity. Upon remand, the Court of Appeals held that magazines, movie film, and advertising materials upon which the prosecution of defendant was predicated were obscene as a matter of law and therefore not constitutionally protected.

Affirmed.

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y., 31 F.2d 409, Part I (5th Cir. 1970).

Obscenity

Magazines, movie film and advertising materials upon which the prosecution of defendant was predicated were obscene as a matter of law and therefore not constitutionally protected.

George Grove, Jr., Beverly Hills, Cal., for defendant-appellant.

Frank McCown, U.S. Atty., Alex H. McGlinchey, Asst. U.S. Atty., Fort Worth, Tex., for plaintiff-appellee.

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

Pursuant to the order of the Supreme Court of the United States dated June 25, 1973 vacating our judgment and remanding this cause to this court, we have made an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Furthermore, we have tested the materials under both the standard for obscenity set out in A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and the standard recently enunciated in Miller v. California, ___ U.S. ___, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *See* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973). The statute involved, 18 U.S.C. § 1461, has been the subject of authoritative judicial construction which renders its application constitutionally proper.

The materials for which Cote was prosecuted were magazines entitled, "Ups and Downs No. 4", "Duplex" and

"Gemini"; a reel of movie film entitled: "Tri-sex"; and advertising materials thereabout.[1] We have tested each and all of these materials in the manner set out in *Thevis, supra.* If the test results of each of these articles were put into tabular form as was done in *Thevis,* every answer to every question would be yes.[2]

Therefore, the convictions of Robert E. Cote upon his pleas of guilty are again

Affirmed.[3]

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[1] The following excerpt from Defendant's brief in this court describes the materials involved:

That the picture books, films and advertisements charged in the indictment in the case at bar depict nude females in sexually suggestive poses and body movements is not in dispute. That there are occasionally a man and woman or two women in a picture (but without explicit sexual activity) is conceded. That the pictures and films are vulgar and monotonous is beyond argument. That no serious social message is communicated or intended by the pictures and films is evident. That no great dramatic talent or graphic artistry is demonstrated in the pictures and films is readily determinable upon a casual viewing. Tawdry? Very probably. Dull? Certainly. Sexually provocative? Perhaps to some: undoubtedly pathetic or laughable to others.

[2] Defendant contends that only hard-core pornography, which he defines as portrayal of explicit sexual acts in which the genitals are exposed, may be punished as criminally obscene. He urges that we follow the "actual performance" of the Supreme Court "as distinguished from its *rhetoric.*" With the announcement of *Miller* and the companion cases of the same date, the Court's "performance" has taken a significant new turn. See *Thevis, supra.*

[3] Cote received concurrent two-year sentences upon each count.